

Improvements in WTO Dispute Settlement

While there has been much discussion about the improvement in the substantive rules governing trade in agricultural goods resulting from the Uruguay Round Agreement on Agriculture and Sanitary and Phytosanitary Measures (SPS), equally important to agricultural trade may be the Uruguay Round changes made to the multilateral dispute resolution process. The initial evidence indicates that the WTO dispute settlement system is a significant improvement over its GATT predecessor. However, the outstanding question for the WTO is no longer whether member countries have an effective means to vindicate their rights. It is whether members whose practices have been successfully challenged under the new and improved dispute settlement procedures will live up to their obligations. [Kevin J. Brosch, USDA Foreign Agricultural Service, e-mail: broschk@fas.usda.gov]

Uruguay Round Strengthened Weak GATT Rules on Agriculture

The Uruguay Round agriculture negotiation and the SPS negotiation—which originally began as the fourth element of the agricultural negotiating agenda—were intended to bring rules governing agricultural trade into line with those affecting trade in other forms of goods. The general perception was that GATT substantive rules, as applied to trade in agricultural goods, were much weaker than as applied to trade in other goods. In particular, GATT Article XVI.1, which concerned the use of domestic subsidies including any form of income or price support, was largely an entreaty, exhorting GATT member countries not to use domestic subsidies in a manner that caused serious harm to the interests of their trading partners. In reality, however, Article XVI did not contain effective disciplines to prevent misuse. The lack of any real discipline in Article XVI.1 was far more troublesome for agricultural trade than for trade in other goods for the simple reason that the use of domestic subsidies was far more prevalent in agricultural production than in any other sector of the world economy. Even more problematic, GATT Article XVI.2-5, which concerned the use of export subsidies and established a strict rule outlawing their use after 1958, contained an express exception for “primary products,” a term that included all unprocessed agricultural products and some widely traded products at early stages of processing.

Pre-Uruguay Round rules were also weak with respect to market access for agricultural products. One of the three basic concepts underpinning the GATT (and now the WTO) system is the progressive liberalization of a tariff-only trading system—i.e., the “binding” and gradual reduction of duties through a series of negotiating “rounds.” However, no GATT rules compelled any of its members to offer concessions on, or to bind, agricultural tariffs. In fact, prior to the Uruguay Round, relative to tariffs on industrial goods,

few agricultural tariff lines were bound. Moreover, the rule designed to insure that the GATT remained a “tariff-only” system (Article XI, which forbade prohibitions or restrictions on imports other than duties, taxes, or charges) also contained significant exceptions for agriculture.

Finally, pre-Uruguay Round rules made it possible for countries to frustrate market access rules by imposing restrictions disguised as health barriers. The experience of the United States and other meat-exporting nations with the European Union’s ban on imports of meat produced with hormones (when the EU’s own medical experts had concluded that the meat posed no known health risk) made it apparent that even if the basic market access rules of the GATT were strengthened, protectionist countries could erect other non-tariff barriers by claiming health justifications. A successful agricultural negotiation required, therefore, that acceptable parameters applying the general exception contained in GATT Article XX(b) (allowing deviation from GATT rules for measures “necessary to protect human, animal or plant life or health”) be negotiated.

Pre-Uruguay Round Dispute Settlement System Emphasized Consensus over Adjudication

The Uruguay Round agriculture and SPS negotiations attempted to deal with—and in many ways successfully addressed—these patent deficiencies in substantive GATT rules. However, it will never be entirely clear whether the real problem of the GATT was the weakness of its substantive rules or the weakness of the GATT dispute settlement process in enforcing the obligations and vindicating the rights that did exist. And nowhere was the failure of the GATT dispute settlement system more apparent than in agriculture.

The GATT dispute settlement system was based entirely on GATT Article XXIII, under which any GATT contracting party that considered that any benefit accruing to it under

Settling Disputes in the WTO

Dispute settlement in the WTO follows this sequence of events:

Consultations: Members attempt to resolve their disputes through bilateral consultations.

Panel established: If the members have not resolved their dispute within 60 days, the complainant may request that the Dispute Settlement Body (DSB) establish a panel.

- Panel formation is automatic.
- Panel establishment should take 20-30 days.
- The panel is directed to examine the case referred by the DSB in light of the provisions of the GATT and to present findings on the case to the DSB that will help the DSB make its recommendations.
- The three panelists generally are chosen from among former representatives to the GATT or former government representatives that have extensive knowledge of trade matters.

Panel proceedings: Each panel follows several steps in formulating its findings.

- *Panel examination:* The panel meets with the parties and third countries to hear their presentation of facts and arguments.
- *Interim review stage:* The panel first sends the descriptive part of the report to the parties for comment. After a period of time determined by the panel, the panel sends an interim report consisting of both the descriptive sections and the panelists' findings and conclusions to the parties for comments.
- The panel first issues the report to the parties and then to the DSB.

Adoption of the panel report: The panel report must be adopted by the DSB within 60 days of its circulation to WTO members unless a party to the dispute appeals the report or the DSB decides by consensus not to adopt the panel report. A party may appeal a panel decision if it does not agree with an issue of the law or the panel's legal interpretation. A standing Appellate Body of seven individuals appointed by the DSB hears dispute panel appeals and makes recommendations to the DSB, which are incorporated in the final panel report. An appellate report is allowed up to an additional 30 days.

Implementation: The losing party to the dispute must submit its proposals for implementation of the panel report "within a reasonable period of time." If the losing party to the dispute does not promptly comply with the panel decision, it must negotiate with the complainant to determine a mutually acceptable compensation.

the agreement had been nullified or impaired, could refer the matter for investigation and ruling by the CONTRACTING PARTIES. (The term "CONTRACTING PARTIES" written in capital letters was meant to signify all of the GATT contracting parties acting together and by consensus).

The concept that a dispute between two parties over application of the GATT Agreement could be successfully resolved before a meeting of all GATT contracting parties was, of course, unrealistic. GATT negotiators apparently expected that Article XXIII would provide the broad framework for dispute settlement, but that detailed procedures would be worked out in negotiations of an International Trade Organization (ITO). When negotiations over the establishment of an ITO failed, the GATT system was left to proceed on the basis of the bare bones of Article XXIII. It did not take long for the GATT contracting parties to realize that the volume of unresolved disputes and the ungainly nature of an

adjudicative process that, in theory, required judgment by all members and consensus decisionmaking necessitated some pragmatic refinements.

As a result, the GATT developed a system of adjudication by panels of judges chosen by the parties to the dispute through formalized procedures. Over the years, the GATT contracting parties issued a number of decisions and interpretations setting forth procedures for resolving disputes under Article XXIII. The first formal Decision on Procedures under Article XXIII (14S/18) was reached and agreed to on April 5, 1966. Subsequent decisions, understandings and declarations, were reached and issued in 1979, 1982, 1984, 1989 and 1994.

The essence of these various decisions was to establish a system whereby disputes between parties would be heard by a panel of three judges chosen by the parties. Despite the

numerous attempts to improve and fine-tune the system, however, GATT dispute settlement had some very fundamental flaws, most of which resulted from the premise that dispute settlement in the GATT was essentially a process of decisionmaking, rather than a more traditional process of adversarial adjudication. As Jackson noted in his writings on the GATT, Article XXIII reflects less the traditional judicial notion of adjudication of rights than the diplomatic notions of the necessity of consultation among contracting parties and the overall maintenance of “continued reciprocity and the balance of concessions in the light of possibly changing circumstances” (Jackson, 1969, pp. 169-170). This may reflect the fact that the initial GATT negotiations were focused far more on obtaining tariff concessions than on developing long-term trading rules.

Pre-Uruguay Round Dispute Settlement Frustrated the United States

In any case, Article XXIII and the procedures developed in its interpretation contained a number of deficiencies in the eyes of those who favored a more adjudicative dispute settlement model. Historically (and perhaps not surprisingly), the United States has been the most litigious member of the multilateral trading system. U.S. complainants, therefore, have been particularly frustrated by aspects of the GATT dispute settlement that effectively denied the United States its GATT “day in court.” For example, under the old GATT system, any contracting party could “block” the creation of a panel by not agreeing to its formation. A single contracting party’s ability to “block” panel formation was based on the notion that if one contracting party did not agree, consensus was destroyed.

Similarly, even where a panel had been formed and the parties had litigated the dispute before the panel, a single contracting party could “block” the adoption of the panel report, which gave the losing party the ability to veto an adverse ruling. Again, the underlying notion was that all GATT actions, even the adoption of a panel report, had to be done by consensus. There are, of course, no analogous rules in the laws of the GATT members themselves. National laws universally require defendants to respond to accusations, and no legal system permits a losing defendant to veto an adverse verdict. Nonetheless, this was GATT dispute settlement before the Uruguay Round.

Although it would seem evident that such a system could never prove satisfactory, there was a belief—perhaps “hope” is more appropriate—that “blocking” of panel formation or report adoption would not be a significant problem because contracting parties would exercise restraint and block only in rare and unusual circumstances. The reality, of course, is that “blocking” was a problem in any instance because it inherently undermined the confidence in a workable system by allowing one contracting party to frustrate another’s attempt to vindicate the rights for which the latter had negotiated.

One other anomaly was that dispute panels were not necessarily obliged to make a decision. Panels could, if they wished, simply hold that they did not know how to interpret a particular provision of the GATT, or how to apply a particular provision in the circumstances presented. The panel could avoid holding whether the complainant was right or wrong in its assertion of rights and simply conclude that it could not decide. This, of course, seriously undermined confidence in the dispute settlement system and in the GATT agreements themselves.

Each weakness in the dispute settlement process contributed, over the years, to the impression that the GATT trading system did not deal effectively with problems in agricultural trade. The problem of “blocking” the formation of panels surfaced dramatically in the dispute between the United States and the European Union over the EU’s measures affecting trade in beef produced with growth-promoting hormones. When the United States attempted to raise the EU’s measures as GATT-illegal import restraints without scientific justification, the EU simply refused to allow a panel to be formed. The United States ultimately retaliated by placing its own restrictions on European tomatoes and other products, and blocked the EU’s attempts to raise the retaliatory measures before a panel.

In other cases, e.g., in its challenge to EU Production Aids granted on Canned Fruit, the United States was successful in having a panel formed. However, when the panel concluded that the United States was entitled to compensation because the EU production aids “upset the competitive relationship between [EU canned fruit and imported canned fruit],” the EU refused to allow the panel report to be adopted.

Nearly as galling were the decisions of the GATT dispute panel in challenges brought against the EU’s system of export subsidies for wheat flour and sugar. The challenge raised by Australia and Brazil was that the EU was using its subsidies to capture “more than an equitable share of world export trade” within the meaning of Article XVI. Despite the desire of the complainants to establish a clear standard for contracting parties’ rights under this provision, the dispute panels engaged largely in ad hoc analysis without providing any greater light on the subject (WTO, 1995, pages 453-455). When the United States marshaled a challenge to the EU wheat flour subsidies in 1983, the panel effectively concluded that it could not determine what the phrase “equitable share” meant.

Uruguay Round Improves Dispute Settlement System

The new WTO Understanding on the Rules and Procedures Governing the Settlement of Disputes (“DSU”) offers improvement in all three of these areas (see box “Settling Disputes in the WTO”). First, a contracting party may no longer block the formation of a panel because the rule

requiring consensus has, in effect, been stood on its head; Article 6 of the DSU now requires consensus to block panel formation. Article 6.1 states:

“If a complaining party so requests, a panel shall be established at the latest at the DSB (Dispute Settlement Body) meeting following that at which the request first appears as an item on the DSB’s agenda, unless at that meeting the DSB decides by consensus not to establish a panel.”

This rule effectively makes dispute settlement automatic upon the filing of the complaint because, after all, there can be no consensus not to establish a panel without the complaining party. Thus, the new rule maintains the traditional GATT notion of consensus decisionmaking, but makes it meaningless in practice. The new “automatic” rule effectively marks a move from the consensus model to the litigious model.

Similarly, panel reports can no longer be blocked by a single party. Adoption of panel reports is now automatic within 60 days from when the report is circulated unless a party has appealed; and, in cases of appeal, automatic after the completion of the appeal process. DSU Article 16 marks an even further departure from the GATT consensus decisionmaking model as it does not even mention the word “consensus.” It states simply that “the report shall be adopted.”

Finally, the DSU makes it clear that the function of the panels is to decide, and not duck, difficult issues presented in disputes. Article 11 of the new DSU provides

The functions of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making recommendations or in giving the rulings provided for in the covered agreements.

Over the years, some of the most trenchant criticisms of the GATT trading system were those directed at the lack of automaticity in dispute settlement, and at the failure of GATT dispute panels to effectively address the issues presented. The new DSU appears to have effectively addressed these issues. The Beef Hormone Dispute between the United States and the European Union, a dispute that the EU had long avoided under the GATT dispute settlement system, has now been fully adjudicated through both the dispute panel and appellate processes. Similarly, the EU Banana

Import case—a politically and diplomatically charged challenge to the EU’s system of import preferences given to former European colonies—has been fully adjudicated. The adjudication of these cases, so politically charged in Europe, probably would have been blocked had it not been for the Uruguay Round improvements to dispute settlement.

Indeed, in the 3-1/2 years since the WTO Agreements have come into force, at least five important agricultural and SPS cases have been adjudicated before the WTO. In addition to the Hormone and Banana disputes, there have been challenges by Brazil to the EU market access for poultry; by Canada to Australia’s restrictions on fresh salmon imports; and by the United States to Japan’s requirements for varietal testing of quarantine treatments of certain fruits. In several cases, the parties have not only adjudicated their dispute before a panel, but have already raised the dispute to, and have received, appellate review. It is not an exaggeration to say that there have been significantly more agricultural-related disputes brought and adjudicated within the past 3-1/2 years than during any comparable period in the past.

Improved Dispute Settlement System Promotes Resolution of Disputes

Although it is impossible to judge, the more automatic dispute settlement system may also foster earlier and more satisfactory settlements of potential disputes. Since the WTO Agreements came into force, there have been satisfactory settlements of several potentially nettlesome trade disputes without having to resort to the formal dispute settlement process. Examples are the disputes over Hungarian export subsidies, Philippine pork and poultry tariff-rate quota (TRQ) administration, and Korean shelf life rules. While under the old GATT system, these types of agricultural disputes—involving, respectively, export subsidies, market access, and SPS issues—often dragged on for years. Each of these recent disputes was resolved in a relatively short time period, perhaps because of greater certainty of being brought before the court of world opinion.

Conclusion

It appears that the WTO dispute settlement system is a significant improvement over its GATT predecessor. But, of course, the WTO Agreements are, in the final analysis, agreements among sovereign nations and the enforcement of panel decisions depends ultimately on the willingness of member countries to play by the rules and to accept judgments, even adverse judgments, where disputes arise. The question for the WTO is no longer whether members have an effective means to vindicate their rights. It is whether members whose practices have been successfully challenged under the improved dispute settlement procedures will live up to their obligations. On this point, the jury is still out.

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